Date: May 12, 1999

Case No.: 1997-TSC-3

In the Matter of:

NORMAN PAWLOWSKI,
Complainant

v.

HEWLETT-PACKARD COMPANY,
Respondent.

Appearances:

Richard C. Busse, Esq.
For the Complainant

Martin H. Kresse, Esq.
Evelyn F. Heidelberg, Esq.
For the Respondent

Before: DONALD B. JARVIS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding arising under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2622.

On December 18, 1996, Complainant Norman Pawlowski filed a complaint against Respondent Hewlett-Packard Company ("HP") with the Department of Labor ("DOL") which alleged that he had been fired for complaining about Respondent's compliance with chemical registration requirements. On January 17, 1997, the District Director of the Wage and Hour Division issued a letter finding that after investigation, Complainant was terminated soon after presenting written notification to the Environmental Protection Agency ("EPA") regarding alleged violations of environmental protection statutes. Thereafter, Respondent filed a timely request for a hearing on the record.

A hearing was held on this case on September 22-26, 1997, and on December 15-18, 1997, in Portland, Oregon. The case was submitted subject to the filing of the transcript, which was received on January 23, 1998.

On February 12, 1998, Respondent requested that I take judicial notice, in support of its post-trial brief, of the EPA's enforcement policies and decisions concerning TSCA. Since Complainant did not object to this relevant evidence, I take judicial notice of the EPA's enforcement policies and decisions concerning TSCA. On September 16, 1998, Complainant filed a Motion To Supplement Record, offering excerpts from a deposition of Brent Gardner. Respondent filed its objection on September 22, 1998. Since this evidence is untimely and Complainant has not demonstrated good cause, I decline to admit it. On October 7, 1998, Complainant filed a Request for Judicial Notice of an EPA complaint against Respondent. Respondent filed an objection on October 13, 1998. On April 12, 1999, Respondent filed a conditional request for judicial notice — if Complainant's request for judicial notice is granted, Respondent asks that I take judicial notice of the EPA's amended complaint against Respondent. I decline to take judicial notice of the EPA complaint and amended complaint because the requests are untimely and the complaints are not relevant evidence. *See International Star Class Yacht Racing Association v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2nd Cir. 1998)(court may take judicial notice of document filed in another court, not for the truth of the matters asserted in the other litigation, but only to establish the fact of such litigation); *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994).

SUMMARY OF EVIDENCE

HP is a large company which manufactures computer related products including printers for sale in the United States and abroad. It is not in the business of manufacturing chemicals. However, HP's printers contain inks which are composed of dyes. These dyes are made up of various chemical substances which may be subject to TSCA. Complainant was hired as a chemist by HP on August 13, 1985, and began working at the Corvallis, Oregon site. TR 89, 91.[1] His duties included developing new dyes and inks, as well as regulatory compliance work. TR 91, 551A. Complainant has a Ph.D. in physical organic chemistry, and prior to being hired by HP, was an associate professor at Oregon State University. TR 88-89.

In 1984, before Complainant began working at HP, Respondent developed some ink dyes known as Production Prototype 1 ("PP1") for its Think-Jet printers. TR 35-38. Robert Miller, Ph.D. was a research scientist at HP in 1984 and was a technical leader on the Think-Jet project. TR 24-27, 36. In 1984, Dr. Miller was of the opinion that the dyes in PP1 were exempt from TSCA registration requirements because of an exemption for printing inks; therefore, Dr. Miller did not register the dyes. TR 41. In March 1984, the Think-Jet project was transferred to David Hackleman. The project was a few months away from commercial manufacturing. TR 38.

[1]The transcript is referred to as TR. Complainant's exhibits are referred to as CX, and Respondent's exhibits are referred to as RX.

In the fall of 1985, less than one month after starting work at HP, Complainant concluded that there might be a TSCA registration problem with the dyes in Think-Jet. TR 374-375. At that time, Think-Jet was currently being manufactured. Sometime in the fall of 1985, Complainant discussed the Think-Jet registration problem with Dr. Miller in Monterey, California. Dr. Miller told Complainant that he felt that the dyes were exempt from TSCA registration requirements because of an exemption for printing inks. TR 40-42. Complainant went to his immediate manager, Dr. David Hackleman,[2] to set up a meeting with an attorney for legal advice. TR 263. A meeting between Complainant and Mr. Gardner, HP's regional in-house counsel in Boise, Idaho, occurred in September 1985 in Corvallis. The parties disagree as to the exact date of the meeting. Complainant testified that Dr. Hackleman was also present at the meeting. Dr. Hackleman testified that he only introduced Complainant to Mr. Gardner and then left the meeting. TR 597. The parties dispute what was said at the meeting. Complainant testified that he filed a Notice of Bona Fide Intent to Manufacture ("BFIM") for the PP1 dyes after he met with Mr. Gardner. Respondent argues that Complainant filed the BFIM before the meeting with Mr. Gardner. The BFIM notice was filed to determine whether the PP1 dyes were already registered with the EPA. The EPA replied that the dyes were not already registered. After the meeting with Mr. Gardner, Complainant filed a Premanufacture Notice ("PMN"), and a Notice of Commencement to Manufacture ("NOC") for the PP1 dyes in order to register them with the EPA.

In 1987, Complainant attended a meeting in Germany with other HP employees. At the meeting he learned that the inks used in the DeskJet and PaintJet printers would only be exempt from European registration requirements if a low volume exemption was applied for. RX 200, p. 995; TR 96-98. Complainant concluded that HP had been illegally importing these inks into Europe because it had never applied for a low volume exemption. TR 98. Complainant testified that he raised this issue with Dr. Hackleman, a project manager and Complainant's immediate supervisor, immediately after the meeting. TR 99, 544A-545A. He continued to raise the issue of European registration with Dr. Hackleman in 1988. TR 100. Complainant testified that he eventually sent an e-mail message regarding the registration issue to Dr. Hackleman and to Ron Prevost, who was a section manager and Dr. Hackleman's immediate supervisor. On July 21, 1989, Complainant sent an e-mail message to higher management, including several marketing managers, concerning the problem of complying with the European registration requirements. CX 20; TR 101.

In September 1990, HP hired a toxicologist, Dr. Holcomb, to work in the regulatory area. Complainant testified that Dr. Holcomb was to report to Complainant, and Complainant was to continue working in the regulatory area on at least a half time basis. Complainant also contends that his new manager, Mr. Coyier, promised to promote Complainant to a level "62" position. TR 204, 205. Respondent contends that Dr. Holcomb was hired to take over all of the regulatory work so that Complainant could concentrate on dye research. TR 680, 690. Respondent denies that Complainant was promised a promotion to a level "62" position. TR 680.

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[2]Dr. Hackleman was a project manager at HP and was Complainant's 1st level manager.

Complainant became concerned with Dr. Holcomb's draft of a low volume exemption letter to the EPA for Acid Red 52. The letter contained information about an AZO dye. Complainant contended that this information was incorrect, and he alerted Mr. Coyier. TR 205-208.

In 1991, Complainant became concerned regarding Dr. Holcomb's draft of the Emergency Handbook. Complainant believed that it contained the wrong ink ingredients and that some of its toxicity information was incorrect. TR 209-210. Complainant testified that the Emergency Handbook was to be distributed to employees, emergency room physicians, and the public. Id. Complainant testified that he informed Dr. Holcomb and Mr. Coyier that the handbook had TSCA implications because it was misleading people about the potential health effects of the inks. TR 213-214. On January 18, 1991, Complainant sent a letter to Dr. Holcomb with his suggestions regarding the handbook. CX 26. Dissatisfied with Dr. Holcomb's response, Complainant notified Dr. Holcomb's manager, Mr. Coyier. Complainant testified that Mr. Coyier determined that his criticism was unwarranted and that he was picking on Dr. Holcomb. TR 218. Mr. Coyier testified that he disagreed with some of Complainant's criticisms. TR 721. Complainant raised his concerns at a HP Chemical Review Council meeting. TR 218. In May 1991, the Chemical Review Council approved the handbook. TR 237. On August 6, 1991, Complainant submitted a detailed critique of the Emergency Handbook to David Bruce, an in-house attorney at HP. TR 237. Mr. Bruce hired an outside consultant, ENVIRON, to review the handbook. ENVIRON issued a report dated October 22, 1991, which recommended that the handbook be revised because it contained internal inconsistencies, errors and misleading statements. CX 39. In December 1991, there was a review meeting concerning the handbook which was attended by the Complainant, Dr. Holcomb, Mr. Coyier, Mr. Provost, Suraj Hindagolla, Skip Rung, Mr. Bruce, Lyle Keeting and the outside consultant. A decision was made to withdraw the Emergency Handbook. TR 237-238. Complainant testified that after the meeting Mr. Coyier stated that Complainant had been wrong about the handbook. TR 238. Complainant also testified that Mr. Coyier again brought up the handbook at his next ranking session. TR 239. Mr. Coyier testified that he did not fault Complainant for his concerns about the handbook, and in fact, he expected him to raise this type of problem. TR 721-722.

In 1991, Complainant also raised concerns about HP's compliance with TSCA registration requirements in general. On April 10, 1991, he sent a message to Mr. Coyier stating that these reporting requirements were being taken lightly by ICD.[3] CX 30; TR 220. Complainant was concerned that Dr. Holcomb was not reporting test results to the EPA. TR 221. On April 12, 1991, Complainant forwarded his complaints to Mr. Bruce. CX 31. In his memorandum, Complainant stated that if it were known that any "outsiders" were copied it would "go very bad for me." Id.

On June 12, 1991, Complainant sent a detailed memorandum to Mr. Bruce that was critical of Dr. Holcomb's handling of regulatory compliance matters. CX 32. Complainant indicated that Dr. Holcomb failed to comply with TSCA reporting requirements for a substance known as Acid Yellow or AY-23. TR 231; CX 32. Complainant stated:

[3]ICD is the Ink Jet Components Division at HP. TR 220.

> These are only recent examples of the bizarre things happening here on a regular basis. I've asked to be disassociated from Michael [Holcomb], but a lot of this stuff will get mud on everyone around including me although I'm gone. The CAP program may get us out of the Section 8 (e) fiasco[4], I may be able to put a stop to the handbook, and I have saved HP's cookies in other debacles, but eventually this guy is going to get us all . . . .
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> . . . Repeatedly I see him feeding false information to cover lack of technical and regulatory diligence. I can see disaster on the horizon just as clearly as some people could prognosticate Pearl Harbor in December, 1941.

CX 32.

On July 30, 1991, Mr. Coyier sent an e-mail message to Wolfgang Huesgen, copying Mr. Holcomb and Complainant. Mr. Coyier stated:

> I hired Michael [Holcomb] in August last year to take over all chemical registration work for Norm [Complainant]. We have all been working hard to make this happen so that Norm could get back into ink design on a full-time basis. His tactical plans now deal strictly with ink design work and Michael has ALL chemical registration responsibility. Please help me keep Norm out of the loop.

CX 15.

Complainant testified that his performance ranking dropped two bands in July 1992 in retaliation for his criticism of the Emergency Handbook. CX 40; TR 239, 242. Mr. Coyier denied that the drop in rank was in retaliation for Complainant's regulatory compliance concerns. RT 700. Mr. Coyier testified that Complainant's performance ranking had dropped only one band based on his performance; Complainant needed to focus on team work, communication and follow through. CX 40; TR 698-702.

In late 1992, Dr. Hindagolla replaced Mr. Coyier as Complainant's project manager. RT 757. On May 7, 1993, Complainant sent a memorandum to Mr. Bruce which criticized management's and Dr. Holcomb's work in regulatory compliance. CX 41. Complainant indicated that Dr. Holcomb inaccurately concluded that the nitrates found in HP's inks posed a health risk. TR 1462-1463. Mr. Bruce contacted Ron Prevost about the matter. To resolve this disagreement, Mr. Prevost hired toxicologists from Technology Services Group ("TSG") to assess the issue. TR 886-887. TSG issued a report concluding that there were some health risks associated with the nitrates. RX 162; TR 888. Complainant testified that Dr. Hindagolla told him that Mr. Prevost was angry with him for having gone "outside the loop" to Mr. Bruce, and that if he did it again he would be fired. TR 243-245. Dr. Hindagolla denied making threats to Complainant that he would be fired if he brought

[4]In July 1991, HP enrolled in the EPA's Compliance Audit Program ("CAP"). TR 1364.

regulatory issues to Mr. Bruce. TR. 762, 766, 782. Dr. Hindagolla testified that he tried to discourage Complainant from taking to Mr. Bruce professional disagreements he was having with Dr. Holcomb. He advised Complainant to first try to resolve the disagreements with Dr. Holcomb directly or with his managers. RT 766-768, 771-773.

In April 1994, Complainant worked on a project involving Reactive Red 180. He informed his managers that the information that HP planned on providing the EPA as part of its TSCA compliance was incorrect. TR 253-255.

On August 19, 1994, Complainant's attorney, Mark Grider, sent a letter to David Bruce advising him that he represented an HP employee who had some serious concerns about HP's compliance with federal laws. Mr. Grider did not identify his client. RX 165. Mr. Bruce testified that he called Mr. Grider several days after receiving the letter. Mr. Bruce surmised that the anonymous employee was Complainant. He agreed to meet with Mr. Grider and Complainant. Mr. Bruce advised Lyle Keating, another HP attorney, about the situation. TR 1371-1373. In March 1995, Mr. Bruce and Bob Johnson met with Complainant and Mr. Grider at Mr. Grider's office to discuss Complainants concerns. TR 1374. Mr. Bruce testified that Complainant had concerns about the Emergency Handbook, Dr. Holcomb's preparation of a low volume exemption, Dr. Holcomb's assessment of the toxicity of nitrates, and whether HP was treating Complainant fairly in his rankings, compensation and promotions. Id. Mr. Bruce and Mr. Johnson agreed to look into the matter. Mr. Bruce wanted to investigate the situation in a manner so as not to disturb Complainant's current work. TR 1375. The next meeting occurred on May 17, 1995 with the addition of Lyle Keating. RX 167; TR 1376-1377. Robert Johnson investigated Complainant's rankings and performance evaluations to determine if there was any indication of unfair treatment. TR 1023. Mr. Johnson concluded that Complainant had been treated fairly. Id.

On June 21, 1995, Skip Rung, Complainant's 3rd level manager, sent a letter to Complainant addressing several of Complainant's past concerns. In regards to Complainant's concerns regarding the Emergency Handbook, Mr. Rung considered Complainant's input helpful. In regards to Complainant's allegations regarding compliance with low volume exemptions, Mr. Rung concluded that HP was in total compliance. Mr. Rung stated:

> I can honestly say that the manner in which you raised this issue was perceived by your management team as being accusatory in tone and divisive in effect. The substance of the complaint seemed subsumed by the personal animosity that had arisen between you and your successor [Holcomb]. In retrospect, I think both you and HP could have handled this incident better.

RX 168.

On July 10, 1995, Complainant's attorney sent Complainant's response to Skip Rung's letter to Lyle Keating. Complainant's 13 page response addressed the following topics: criticism of Dr. Holcomb's handling of low volume exemptions; criticism of Dr. Holcomb's environmental statement

to the EPA concerning lithium salts; Complainant's desire not to leave regulatory work; criticism of Dr. Holcomb's work on the Emergency Handbook;[5] criticism of outside consultants review on nitrates; criticism of John Coyier's work; and allegations that Suraj Hindagolla did not treat him fairly. Overall, Complainant questioned the honesty and integrity of several managers at HP. Finally, Complainant recited the tale of the "Trojan Horse" in an apparent reference to his situation.[6]

On August 8, 1995, pursuant to HP's "open door policy," Complainant met with Dana Seccombe, general manager of the Ink-Jet supplies business unit, to discuss Complainant's regulatory concerns and retaliation charges. TR 258, 523, 527, 533. Mr. Seccombe spent three hours discussing these issues with Complainant and took several pages of notes. TR 531; RX 172. Mr. Seccombe identified three primary issues: 1) Complainant felt that he was not receiving recognition for his technical accomplishments; 2) HP in the past and possibly in the present was not in compliance with government toxicology regulations; and 3) Complainant's rankings were too low because various HP employees and supervisors were discrediting him. Id. According to Mr. Seccombe, Complainant wanted three things: 1) a promotion to a section (i.e. second) level manager position; 2) to salvage his reputation; and 3) an adjustment in pay which was a lesser issue. TR 533-536. Since Complainant had a relatively positive impression of David Bruce, Mr. Seccombe decided to have Mr. Bruce and Robert Johnson investigate Complainant's allegations. TR 540-541. On August 16, 1995, Mr. Bruce sent a letter to Complainant's attorney, Mark Grider, discussing Complainant's allegations of two regulatory compliance issues. RX 174. Mr. Bruce concluded that HP did not violate Canada's toxic substance registration laws, and HP did not fail to report a toxicology study to the EPA regarding Acid Yellow-23. Id. On September 5, 1995, Mr. Bruce sent a letter to Complainant's attorney describing the results of the investigation into Complainant's allegations of unfair treatment. RX 175. Mr. Bruce and Mr. Johnson concluded that there was no evidence of any unfair treatment. Id.

On October 27, 1995, Complainant sent a 20 page letter to Mr. Seccombe in response to Mr. Bruce's reports of August 16, 1995, and September 5, 1995. RX 177. In essence, Complainant disagreed with Mr. Bruce's conclusions. In conclusion, Complainant stated:

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[5]Complainant stated: "The EHB is dangerous, unethical, and immoral. It violates all of the right to know laws and possibly Section 8 (TSCA). It is outrageous. It is criminal. It violates the laws of human decency. It was shockingly negligent of HP to leave the perpetrators of this hoax in charge of your regulatory program." CX 46, p. 288.

[6]Complainant stated: "Cassandra was the daughter to the King of Troy, Pram, and sister to the Trojan Hero, Hector. She was cursed by the gods with the power of prophecy and the affliction that no one would believe her. When Paris (also her brother) brought Helen to the city, she begged them not to admit this woman, for the Greeks would follow and destroy the city. She was ignored. When she pleaded with Hector not to accept the challenge from Achilles, for he was doomed before the clash, she was belittled. And when she cried 'There are Greeks in the Horse,' they laughed." CX 46, p.297.

> It appears that there are two solutions here. It is time for those involved to come forward and report the situation we are all facing at those times, and speak the truth about these matters. HP cannot hide the fact that serious errors were made. You can hire an independent, outside investigator. Or, if your attorneys continue to dig in their feet, distort facts for their own protection, and refuse to face reality, then I will do my best to protect myself without further expectation that my communications with you have the possibility of rectifying the damage done to my reputation and career.

RX 177, p. 856.

On December 5, 1995, Complainant's attorney, Mr. Grider, sent a letter to HP's in-house counsel, Lyle Keating. RX 179. Mr. Grider stated that if HP did not agree to binding arbitration by the next day, Complainant will "contact the appropriate regulatory agencies and enforcement offices with his complaints." Id. On December 11, 1995, Mr. Bruce responded, rejecting the demand for arbitration and suggesting that the parties mediate the dispute. RX 180.

On December 19, 1995, Complainant sent an e-mail message addressed to Jack Brigham, HP's general counsel, with copies to several other individuals including Bill Hewlett and Dave Packard, HP's founders. RX 181. Complainant made numerous allegations that HP's managers had a policy of non-compliance towards U.S. and world-wide regulations. For example, Think-Jet was initially manufactured without TSCA registration. Mr. Gardner instructed him to secretly register it. RX 181, p. 864. HP introduced Desk-Jet in Europe without European chemical registration. RX 181, p. 865. In 1991, HP issued an Emergency Handbook which disseminated false information about ink jet cartridges. RX 181, p. 865-867. During a joint venture, HP managers asked ICI to go to market with unregistered chemicals. RX 181, p. 868. Complainant requested that HP conduct an independent investigation or submit to binding arbitration. RX 181, p. 869-870. If no agreement is reached, "we will continue the promised prosecution through Federal enforcement officials." RX 181, p. 870.

On December 21, 1995, Mr. Bruce sent a letter to Mr. Grider proposing to utilize an outside investigator. RX 182. Mr. Bruce proposed hiring Stanley Landfair, a partner at the law firm of McKenna & Cuneo[7], to investigate Complainant's allegations. Mr. Bruce disclosed that Mr. Landfair and his firm had been retained by HP in the past to provide legal advice and that Mr. Landfair specialized in TSCA law and was familiar with HP's practices. In addition, Mr. Bruce stated "If this proposal is acceptable to you, HP will also not attempt to prejudice your right to proceed before the US Environmental Protection Agency for the additional period of time it takes to complete this investigation." RX 181, p. 872. Complainant agreed to have Mr. Landfair investigate his complaints. TR 500. On December 27, 1995, Mr. Bruce sent a retainer letter to Mr. Landfair asking him to investigate Complainant's allegations. RX 183.

[7]This is the same law firm that represents Respondent in this action.

Mr. Landfair began his investigation in January 1996. He retained Richard Curiale, another partner at McKenna & Cuneo, to assist with the investigation because of his expertise in labor and employment law issues. TR 1118-1120. Complainant met with Mr. Landfair and Mr. Curiale on three occasions, and with only Mr. Landfair on one additional occasion. Mr. Landfair took handwritten notes at the meetings, and later reduced them to typed memoranda. RX 184, 186, 187, 190, 191. The meetings with Complainant occurred on January 5, 1996, January 30, 1996, April 9, 1996, and July 18, 1996. RX 200. Mr. Landfair used Complainant's letter to Mr. Bingham as a roadmap for the investigation. He asked Complainant about his background and about the details of his allegations. TR 1120-1124. On January 14, 1996, Complainant sent a letter to Mr. Landfair providing additional details about his complaints including instances of unfair treatment. RX 185. On February 1, 1996, Complainant sent a letter to Mr. Landfair addressing the European low volume exemption issue. RX 189. On April 17, 1996, Complainant sent a letter to Mr. Landfair asking that he remove the names of Rick Van Abkoude and Jim Martin from the report. RX 192. Mr. Landfair also interviewed Brent Gardner, Skip Rung, John Coyier, Suraj Hindagolla, Michael Holcomb, David Hackleman, and Rick Van Abkoude. TR 1144-1145; RX 193-198.

On July 25, 1996, Mr. Landfair issued his report to HP. RX 200. Mr. Landfair concluded that two of Complainant's regulatory complaints had merit. HP manufactured a chemical, TEA Salt of Food Black#2, without previously registering it with the EPA in violation of TSCA. HP submitted false PMN and NOC notices for that substance in violation of TSCA. Mr. Landfair concluded that Complainant acted alone in filing the false PMN and NOC notices. Mr. Landfair stated:

> The statements of the other persons that I interviewed confirm that no one at HP conspired to violate the law and that no one knowingly directed Dr. Pawlowski to do anything unlawful. At worst, Dr. Pawlowski misinterpreted their instructions to "get the company into compliance" as an instruction to falsify documents, and did so under the misimpression that he was carrying out the company's wishes. At worst, the other HP officials were looking to Dr. Pawlowski as the expert on these issues and trusting that his actions were correct and lawful, and Dr. Pawlowski schemed to falsify the documents without any instruction to do so. In either case, it appears that none of the other HP officials that Dr. Pawlowski points to - Brent Gardner, David Hackleman or David Bruce - had any reasons to believe that Dr. Pawlowski was going to falsify documents on behalf of HP. Dr. Pawlowski, on the other hand, clearly admits that he did so intentionally.

RX. 200, p. 985. Mr. Landfair also concluded that the remainder of Complainant's regulatory allegations lacked merit.

After the Landfair report was issued, Mr. Seccombe, Mr. Bob Johnson, Mr. Bruce, Mr. Keating, and Ms. Judy McElvey met to discuss the impact of the report. TR 549-550. It was decided that Complainant should be terminated because he deliberately filed false documents with the EPA. Id. The decision was made by Mr. Seccombe and Mr. Johnson. TR 552, 1039. Although they wanted to terminate Complainant's employment immediately, they decided, based on legal advice,

to place him on administrative leave so that he would be available to assist with the EPA's investigation. TR 551, 1039. Mr. Seccombe anticipated that Complainant would be terminated in about one month. TR 551. As a result of the Landfair report, HP self disclosed the PMN and NOC reporting violations to the EPA on July 30, 1996. RX 201. TR 546. HP submitted a letter to the EPA on August 19, 1996, arguing that penalties were not warranted. RX 205.

On August 13, 1996, HP sent a copy of Landfair's report to Mark Grider.[8] RX 203. On August 14, 1996, HP notified Mr. Grider that Complainant had been placed on paid administrative leave. RX 204. Mr. Landfair sent a detailed letter regarding his findings to Mr. Grider on August 19, 1996, including copies of his memoranda of interviews with Complainant. RX 206.

On September 23, 1996, Complainant sent a 32 page letter to the EPA alleging that HP has a policy of ignoring federal and international environmental regulatory laws. RX 207. Subsequently, Mr. Seccombe and Mr. Johnson decided that Complainant's administrative leave should be concluded, and Complainant terminated because the EPA had not responded to the disclosures. RT 552-553; 1040. On November 8, 1996, Mr. Keating sent a letter to Mr. Grider stating that Complainant's employment would be terminated effective November 30, 1996, because of his wilful falsification of the PMN and NOC notices in violation of company policy. RX 208. On December 6, 1996, Skip Rung sent a letter to Complainant advising him that his employment with HP was being terminated effective December 6, 1996, for falsifying records in violation of company policy. RX 209.

ANALYSIS

The Toxic Substances and Control Act provides in part that:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has —
>
> > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
> >
> > (2) testified or is about to testify in any such proceeding; or
> >
> > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

15 U.S.C. §2622 (a).

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[8]HP did not forward a complete copy of the report. The Executive Summary section was not included.

The burdens of proof and production for whistleblower cases under the TSCA are derived from Title VII cases, in particular, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Carroll v. USDOL*, 78 F.3d 352 (8th Cir. 1996). To establish a *prima facie* case, complainant must show that 1) he engaged in protected activity under the TSCA; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer.[9] *See Carroll*, 78 F.3d at 356; *Mackowiak v. Univeristy Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984).

Once the complainant has established a *prima facie* case, the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the adverse action was taken for a "legitimate non-discriminatory reason." *Burdine*, 450 U.S. at 254. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id*. However, the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Id*. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255. In spite of this shifting burden, the complainant at all times retains the ultimate burden of persuading the trier of fact that he was discriminated or retaliated against. *Id.* at 253.

Once the employer rebuts the presumption of discrimination, it "drops from the case." *Id*. at 255 n.10. The burden then shifts back to the Complainant to prove by a preponderance of the evidence that the proffered reason is a pretext and that the real reason for the adverse action was retaliation for his protected activity. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Zinn v. University of Missouri*, 93-ERA-34 and 36 (*Sec'y* Jan. 18, 1996).

Where evidence of a mixed motive exists — where there are legitimate reasons for an adverse action in addition to unlawful reasons — the employer bears the burden of establishing by a preponderance of the evidence that it would have taken the same adverse action in the absence of the employee's protected activity. *See Carroll*, 78 F.3d at 357; *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed motive case under Title VII).

Further, once a case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *See Carroll v. Bechtel Power Corp., 1991-ERA- 46*

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[9]Some courts add a fourth element, whether the employer was aware of the protected activity when it took the adverse action. *See Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995); *Brothers v. Liquid Transporters, Inc.*, 89-STA-1 (Sec'y Feb. 27, 1990). However, such an awareness is necessary to establish a causal link, the third element.

slip op. at 9-11 (Sec'y, Feb. 15, 1995), aff'd Carroll v. U.S. Dept. of Labor, 78 F.3d 352 (8th Cir. 1996).

JURISDICTIONAL FINDINGS

Based upon the evidence of record, I make the following findings related to jurisdiction:

1. Both parties are subject to the Act.

2. The parties are subject to the jurisdiction of the Office of Administrative Law Judges of the United States Department of Labor.

3. Respondent is an employer within the meaning of the TSCA.

4. Complainant is an employee within the meaning of the TSCA.

AFFIRMATIVE DEFENSES

Respondent argues that Complainant is precluded from pursuing a whistleblower action under TSCA because he deliberately violated a provision of the Act. Respondent argues that Complainant deliberately filed three false documents, a Notice of Bona Fide Intent to Manufacture ("BFIM"), a Premanufacture Notice ("PMN"), and a Notice of Commencement to Manufacture ("NOC"), with the Environmental Protection Agency ("EPA") concerning the manufacture of TEA[10] Salt of Food Black #2, a chemical substance in the dyes used in the Think-Jet printer.[11]

Section 2622 (e) of the Act states that:

> Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from the employee's employer (or any agent of

[10]"TEA" stands for triethanolamine.

[11]Filing false BFIM, PMN, and NOC notices may also be a violation of the False Statements Act, 18 U.S.C. § 1001.

> the employer), deliberately causes a violation of any requirement of this chapter.

See 15 U.S.C. § 2622(e).

Respondent has the burden of proving §2622 (e) as an affirmative defense, and must prove (1) that the act was done without direction from the employer, (2) that the complainant deliberately did the act, and (3) that the act caused a violation of TSCA. *See, Fields v. Florida Power Corp.*, 96-ERA-22 (ALJ Mar. 11, 1997).

Section 5(a)(1) of the Toxic Substances Control Act requires entities to notify the EPA at least 90 days prior to the manufacturing of a new chemical substance. 15 U.S.C. §2604 (a)(1). TSCA permits an entity to file a BFIM notice to determine if a substance that it intends in good faith to manufacture for non-exempt commercial purposes is on the confidential TSCA inventory.[12] 40 C.F.R. §720.25 (b). Complainant filed a BFIM for TEA Salt of Food Black #2 on September 12, 1985.[13] TR 313; RX 18. The EPA replied verbally on October 1, 1985 and in writing on October 21, 1985, that the substance was not listed on the TSCA inventory. RX 243. Respondent contends that the BFIM was false because it represented that the manufacture of the substance was to occur in the future when the Complainant knew that HP had been manufacturing the substance since 1984. RPB 2.[14]

Based on his undisputed testimony, I find that the Complainant deliberately filed the BFIM. Complainant was the only individual who was involved in the actual drafting of the BFIM notice. TR 265. Complainant has never contended that he made any inadvertent mistakes in the content of the BFIM notice.

Next, I must decide whether the filing of the BFIM was done at the direction of HP. Complainant testified that he filed the BFIM at the direction of HP's in house attorney, Mark Gardner. TR 264, 291-292, 314-315. According to Complainant, this occurred during a meeting with Mr. Gardner at HP's Corvallis site in September 1985, where Complainant brought to Mr. Gardner's attention the possibility that HP inadvertently manufactured the substance in violation of

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[12]If a substance is already listed on the TSCA inventory, then it is not a new chemical substance and therefore the reporting requirements of TSCA §5 do not apply. 40 C.F.R. §§ 720.22, 720.25.

[13]This TEA salt was used in PP1. TR 373.

[14]"RPB" stands for Respondent's Post-Trial Brief.

TSCA. RT 262-265, 291-292. Complainant testified that he filed the BFIM after the September meeting with Mr. Gardner. TR 313. Mr. Gardner's testimony did not directly address whether he instructed the Complainant to file a BFIM notice. Mr. Gardner did testify that at the time of their meeting there was an ongoing search to see if the substance was on an inventory list. TR 524A. Mr. Gardner testified that he received two memoranda from Complainant at the meeting - a September 11, 1985 memorandum addressed to Dave Hackleman titled "What to do about EPA", and a September 16, 1985 unaddressed memorandum titled "Compliance with Government Regulations HP products Containing Chemicals." RX 246; RX 246; TR 520A-521A.

Respondent argues that Mr. Gardner could not have instructed Complainant to file the BFIM because the BFIM was filed before Complainant ever met with Mr. Gardner. RPB 3-4. Mr. Gardner testified that the meeting occurred on September 18, 1985, based on a notation in his calendar indicating that he was in Corvallis on that day.[15] TR 529-530; CX 87. Complainant's recollection of when the meeting occurred was equivocal. In the September 11, 1985 memorandum, Complainant described filing a BFIM to determine whether Food Black#2 is on the inventory list, and what steps HP should take if it is not on the list. Complainant mentioned his research of the regulations and discussions with the EPA, but he did not mention any legal advice from Mr. Gardner.[16] Complainant described his dilemma in how to resolve the problem and mentions that a lawyer may be needed. RX 245. As such, this memorandum most likely pre-dates the meeting with Gardner.[17] Dr. Hackleman does not recall when he received the memorandum, but he testified that logically it would have pre-dated the meeting. TR 596. Since the meeting with Mr. Gardner occurred on September 18, Mr. Gardner could not have advised Complainant to file the BFIM, because Complainant had already filed it on September 12. Therefore, I find that Respondent did not direct Complainant to file the BFIM.

The next issue is whether the filing of the BFIM notice violated TSCA. The information that Complainant provided in the BFIM was not false. HP did intend to manufacture (or continue to manufacture) the substance in the future. Intending to manufacture a substance in the future and currently manufacturing the substance are not mutually exclusive propositions. The key issue is whether the Complainant had a duty to disclose in the BFIM that HP was already manufacturing the

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[15]Mr. Gardner's office is in Boise, Idaho, and he traveled to various HP sites as part of his regular duties. TR 519A

[16]He does suggest that Brent Gardner should give a second opinion on his suggestions.

[17]Complainant testified that he had never heard Mr. Gardner's name until the meeting in Corvallis. TR. 312. If that is true, then the memorandum referring to Mr. Gardner must have been written after the meeting. However, I am discounting this testimony since there is no corroborating evidence that the memorandum was drafted after the meeting with Mr. Gardner. It is reasonable to infer that Pawlowski heard of Mr. Gardner while researching the TSCA issues or from Dr. Hackleman.

substance. Part 720 of the Code of Federal regulations governs pre-manufacture notifications. The requirements for filing a BFIM describe several pieces of required information. It is notable that the regulations are silent regarding whether the substance is currently being manufactured. There is no required form for a BFIM notice.[18] I am not aware of any statute, regulation or case that makes the filing of a BFIM while a company is currently manufacturing a substance a *per se* violation of TSCA. Respondent does not offer any authority for such a proposition. Respondent did submit the EPA's Enforcement Response Policy regarding Section 5 of TSCA with its post trial brief. I take judicial notice of this policy. While the policy does cover a wide range of violations concerning the filing of PMN and NOC notices, violations concerning the filing of BFIM notices are conspicuously absent. Dr. Robert Israel testified as an expert on TSCA based in part on his experience working at the EPA. He testified that the filing of the BFIM was false or misleading because it would have misled the EPA into believing that the substance was not currently being manufactured. TR 1071-1073. Dr. Israel did not identify any legal authority or specific EPA policy for his conclusion. Filing a BFIM notice was necessary to determine whether the substance was already listed with the EPA; if it was listed, then there would have been no TSCA violation. Therefore, it was necessary for Complainant to file the BFIM notice to determine whether HP was in compliance. I also note that there is no evidence in the record that the EPA ever considered the filing of the BFIM in this case to be a violation of TSCA. In addition, Respondent's investigation by Mr. Landfair which focused extensively on Complainant's registering of TEA Salt of Food Black #2, did not find a TSCA violation for the filing of the BFIM. RX 200. I find that Respondent has failed to establish that the filing of the BFIM notice violated TSCA. Therefore, Respondent has failed to prove that Complainant deliberately violated TSCA by filing the BFIM.

Respondent also claims that Complainant violated TSCA by filing a fraudulent Premanufacture Notice ("PMN") with the EPA for TEA Salt of Food Black #2. RPB 5. Complainant testified that he filed the PMN. TR 265; CX 12. While his immediate manager, Dr. Hackleman, signed the PMN, it is undisputed that the Complainant completed the notice and was responsible for its filing. Dr. Hackleman signed the PMN on November 1, 1985. CX 12. On December 30, 1985, Complainant sent a memorandum to Mr. Gardner and Dr. Hackleman informing them that the EPA had reviewed the PMN. CX 13. There is no suggestion that the Complainant made any inadvertent mistakes regarding the completion or filing of the PMN. Therefore, I find that the Complainant deliberately filed the PMN with the EPA.

Next, I must decide whether the filing of the PMN notice violated TSCA. The form requires the submitter to estimate the maximum production volume during the first 12 months of production. RX 22 p. 120. In the space provided, Complainant entered "1,034 kg/yr (optimistically high)." Id. Complainant testified that there was nothing in the completed PMN that would alert the EPA that the substance was currently being manufactured. TR 398-399. Complainant's September 11, 1985 memorandum to Dr. Hackleman states that he knew that HP had been manufacturing the substance

[18]Complainant sent the BFIM notice in the form of a letter to the EPA.

since mid-1984. RX 17. Robert Sussman, Respondent's TSCA legal expert, testified that the only potential purpose of the words "optimistically high" is to mislead the EPA into believing that there was no actual production history for the substance. RT 1258-1259. Dr. Robert Israel, Ph.D., a chemist who is a TSCA expert, also testified that the PMN was false or misleading. TR 1074. I agree. Since the substance had been in production for over a year, Complainant should not have added the phrase optimistically high. The PMN was false and misleading. The EPA's TSCA Section 5 Enforcement Response Policy states that "Withholding information or submitting false or misleading information with regard to a PMN, Significant New Use Notice, or exemption request" is a level 1 violation.[19] In sum, I find that the Complainant deliberately filed a false and misleading PMN notice in violation of TSCA.

Next, I must decide whether the filing of the PMN was done at the direction of HP. Complainant argues that he filed the PMN based on the instructions provided by Mr. Gardner and Dr. Hackleman. Complainant testified that he met with both Mr. Gardner and Dr. Hackleman in September 1985 to discuss the Think-Jet ink problem. Dr. Hackleman denied attending the meeting; he stated that he only introduced Complainant to Mr. Gardner. Complainant advised Mr. Gardner that HP might not be in compliance with TSCA for its Think-Jet Ink. Mr. Gardner stated that there was no need to notify the EPA regarding the possible violation and that there was no need to stop manufacturing the substance. TR 263-264. Mr. Gardner told the Complainant to get it registered. TR 264. As such, the record is clear that Complainant filed the PMN on behalf of HP as part of his regular job duties. The key issue is whether the false information in the PMN is solely attributable to Complainant. While the Complainant admits that no one at HP instructed him to break the law or falsify the PMN, he argues that he completed the PMN based on Mr. Gardner's instructions. Mr. Gardner told him to get the substance registered, but not to notify the EPA about the violation. Complainant did exactly that. He drafted the PMN to register the substance, but did so in a manner to avoid notifying the EPA of the violation. Mr. Gardner testified that he meant for the PMN notice to notify the EPA of the violation. Mr. Gardner's credibility here is questionable since he admittedly was not familiar with the content of PMN notices. At worst, Mr. Gardner wanted to cover up the violation by not notifying the EPA. At best, he was ignorant regarding TSCA compliance and gave Complainant misleading or incomplete advice. According to Dr. Powell, HP should have filed a mock PMN notice. Mr. Gardner's advice to continue manufacturing the product may also have been incorrect. Since manufacturing a substance that is not registered with the EPA is a continuing violation subject to per day fines, such advice could have subjected HP to additional civil fines. And wilfully continuing to manufacture a substance in violation of TSCA could have subjected HP to criminal penalties. I note that Robert Sussman, Respondent's TSCA legal expert, testified that Mr. Gardner's advice was reasonable at the time because the state of the law was uncertain. TR 1254,1257. However, even if Mr. Gardner did not want Complainant to mislead the EPA, the issue is not whether Mr. Gardner's advice was reasonable, but is whether Complainant's actions were reasonable in light of Mr. Gardner's advice.

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[19]Pursuant to the EPA's Gravity Based Penalty Matrix, a level 1 violation can result in fines of $5,000 to $25,000 per day.

Complainant's actions in filing the PMN notice were reasonable. Complainant discovered the potential TSCA violation for failing to register Food Black #2 with the EPA. This initial violation was not Complainant's fault, since it pre-dated his employment at HP. Complainant was new to the job and was not an expert on TSCA compliance. He researched the regulations. He discussed the registration problem with Dr. Miller, a scientist who had previously worked on the PP1 project. Complainant drafted a memorandum outlining the potential violation and possible solutions. He advised Dr. Hackleman, his immediate manager of the problem. Dr. Hackleman was not knowledgeable about TSCA. Complainant requested to consult with a HP attorney. Mr. Gardner, HP's attorney, told Complainant that there was no need to stop manufacturing. Complainant asked Mr. Gardner whether he should notify the EPA about the violation. Mr. Gardner said no. He told Complainant to get it registered. Complainant did exactly that. This is not a situation where Complainant secretly attempted to mislead the EPA on his own. He identified a problem; he conducted research; he consulted with several individuals; he followed Mr. Gardner's advice; and he kept his manager informed about the situation. In sum, I find that HP's conduct contributed to the filing of the false PMN notice. The original violation for failing to register the substance was HP's fault. Mr. Gardner's misleading and incomplete advice led to the filing of the fraudulent PMN notice.

Respondent also claims that Complainant violated TSCA by filing a fraudulent Notice of Commencement ("NOC") with the EPA for TEA Salt of Food Black #2. The purpose of the NOC is to inform the EPA of the initial manufacture of a PMN substance, so that the EPA may list the substance on the TSCA Inventory. *See* 15 U.S.C. §2607(b)(1). A NOC must be filed for a substance, which a previous PMN notice was filed, no later than 30 days from the date manufacturing commenced for a non exempt commercial purpose. *See* 40 C.F.R. §720.102. The EPA's TSCA Section 5 Enforcement Response Policy states that "submission of a false NOC is a level 1 violation.

Complainant filed the NOC for TEA Salt of Food Black #2 on July 22, 1986. RX 28. The NOC indicated that HP would commence manufacturing Food Black #2 on July 14, 1986. Id. Respondent contends that this is a false statement in violation of TSCA because HP had been manufacturing Food Black #2 since mid-1984. RPB 7. Complainant admits that he filed the NOC and was solely responsible for its preparation. TR 403-404. Complainant contends that this was not a false statement because the July 22nd date refers to when HP switched from a reverse osmosis process to an ion exchange method. TR 267. The reverse osmosis process produced a mixed salt, whereas the ion exchange process produced a full salt. TR 406. In effect, the NOC was for the full salt, while the PMN was for the mixed salt. Complainant's explanation appears improbable since the NOC refers back to the PMN — they appear to refer to the same substance which had been in production since mid-1984. And, even if Complainant's characterization of the substance is correct, the filing of the NOC would be improper since there was never a PMN filed for the alleged full salt. I also note that both the Complainant's expert, Dr. Powell and Respondent's expert, Dr. Israel, concluded that Complainant filed a false NOC. TR 121, 1083. In sum, I find that the Complainant deliberately filed a false NOC.

Like the PMN, I conclude that the Complainant filed the false NOC at the direction of the Employer. Mr. Gardner instructed Complainant to register the substance but not to notify the EPA. The NOC is the final step to register the substance. Complainant drafted the NOC to register the substance without alerting the EPA to any violations. Like the PMN, it was reasonable for the Complainant to conclude that was what Gardner meant. Respondent's argument that Mr. Gardner never gave Complainant any instructions regarding the NOC is misplaced. Mr. Gardner's knowledge or intent regarding the registration process is not at issue. Since the NOC was a necessary step to register the substance, it was reasonable for Complainant to rely on Gardner's instructions regarding the PMN notice.

THE TERMINATION

The primary issue in this case is whether Complainant's employment with Respondent was terminated because Complainant engaged in protected activity under the Act. There is no jurisdiction to enforce alleged violations of TSCA's chemical registration requirements. Enforcement of these matters is left to others. As such, I need not determine whether Respondent actually violated any chemical registration provision of the Act. Likewise, I need not determine whether Respondent violated any foreign chemical registration laws.

I find that Complainant engaged in some protected activity. Protected activity includes the making of internal complaints. *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Protected activity includes preliminary steps to commencing or participating in a proceeding when those steps "could result in exposure of employer wrongdoing." *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1 (Sec'y Apr. 27, 1987), slip op. at 6. Threats to expose wrongdoing by management is also protected activity. *See MacLeod v. Los Alamos National Laboratory*, 94-CAA-18 (ARB Apr. 23, 1997). The complaint may be informal. *See Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity); *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected). When a complainant alleges a violation, it does not matter whether the allegation is ultimately substantiated; rather, it only needs to be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. Therefore, I need not determine whether Respondent actually violated any environmental laws. Complainant must have a reasonable perception that his employer was violating or about to violate environmental laws. *See Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 17, 1993).

Complainant's internal complaints to management regarding potential TSCA registration violations of various chemical substances are all protected activities. While Respondent does contend that in most of these instances it did not violate TSCA, it does not argue that Complainant's complaints were unreasonable. In regards to the 1985 Think-Jet registration issue, Complainant advised both his manager, David Hackleman, and HP's regional attorney, Brent Gardner, that HP was

potentially in violation of TSCA because it was manufacturing new chemicals that were not registered with the EPA. This was a reasonable concern. In regards to the low volume exemption for Acid Red-52, Complainant advised his manager, John Coyier, that Dr. Holcomb's letter to the EPA contained incorrect information. This was a potential TSCA violation. In 1991, Complainant advised Mr. Coyier and Mr. Bruce of his concerns with HP's compliance in general with TSCA reporting requirements. Since at that time, part of Complainants responsibility was in the area of TSCA compliance, he would be in a position to have knowledge of HP's general practices. And considering Complainants past concerns, this internal complaint was reasonable and is protected activity. Likewise, Complainant's internal complaint to Mr. Bruce concerning the registration of Acid Yellow-23 is a protected activity. Complainant's internal complaint regarding Reactive Red 180 is also protected activity.

Complainant's internal complaints regarding the toxicity of nitrates is a close case. This complaint is actually the opposite of a typical whistleblower complaint. Here, Dr. Holcomb's opinion was that the nitrates were toxic and HP needed to place appropriate warnings on its products. Complainant was not concerned that HP might be violating TSCA. Instead, he felt that the company was being too safe — the nitrates were not toxic in his opinion. The issue is whether an employee's complaint that his employer is being overly cautious or protective can be considered a protected activity. I am not aware of any cases on point. The environmental whistleblower protection statutes are designed to protect an employee from retaliation for initiating a complaint regarding a potential violation of the Act. To constitute protected activity under the environmental whistleblower protection statutes, "the employee's complaints must be grounded on conditions constituting reasonably perceived violations of the environmental laws." *Minard v. Nerceo Delmar Co.*, 92-SWD-1 (Sec'y January 25, 1994) slip op. p. 8. Complaints relating solely to occupational safety issues as distinguished from environmental issues do not constitute protected activities under the environmental whistleblower statutes. *See Melendez v. Exxon Chem. Americas*, 93-ERA-6 (Sec'y March 21, 1994); *Aurich v. Consolidated Edison Co., of New York*, 86-CAA-2 (Sec'y April 23, 1987). Here, Complainant was not alleging that Respondent was in violation of TSCA regarding the nitrates. Complainant's complaint would not have the potential effect of initiating any proceeding under the Act. His complaint that HP was being too cautious does not fall within the protective spirit of whistleblower claims. In sum, I find that Complainant's internal complaint regarding the toxicity of nitrates is not protected activity.

Next, I address whether Complainant's internal complaints regarding the Emergency Handbook are protected activities. Complainant alleged that the handbook contained incorrect toxicity information. Complainant contends that this false information might be in violation of TSCA § 8. Section 8 of TSCA requires entities who manufacture chemical substances to report and retain information concerning the chemical substances. This information includes "All existing data concerning the environmental and health effects of such substance or mixture." 15 U.S.C. § 2607(a)(2)(E). Complainant did not produce any evidence to demonstrate that the handbook was created as part of HP's compliance with TSCA. There is no suggestion that the handbook was going to be submitted to the EPA. Instead, the handbook was designed as a resource for employees,

emergency room physicians, and the public. TR 209-210. TSCA does not require manufacturers to create such a handbook. Robert Sussman, a TSCA expert, testified that the handbook did not implicate TSCA § 8. TR 1260. Mr. Sussman testified that the purpose of Section 8 (E) is "to require companies to submit to the EPA new information that is not in the scientific literature or not already known to the agency, generally new toxicity information that is not in the public domain...." Id. Dr. Powell, another TSCA expert, testified that the handbook potentially violated TSCA § 8. TR 137-138. However, since Dr. Powell's opinion appears to be based on the incorrect premise that the handbook was created to comply with Section 8, I will disregard it. In sum, I find that Complainant's internal complaints regarding the Emergency Handbook are not protected activities because the handbook does not involve TSCA.

Even if the handbook does not involve TSCA, Complainant argues that he reasonably believed that there was a potential TSCA violation. I disagree. In 1991, when Complainant first complained about the handbook, he never indicated that there was a potential TSCA violation. CX 26. It was not until 1995, after obtaining an attorney, did Complainant articulate a potential TSCA violation. Complainant's *post hoc* rationalization of a possible violation of an environmental law does not meet the *Minard* reasonableness standard. In addition, Complainant never indicated that he believed that the handbook was created as part of HP's compliance with Section 8. In sum, it was not reasonable for Complainant to believe that the handbook involved TSCA.

Complainant's various internal complaints alleging retaliation for his TSCA compliance complaints and his complaints reiterating his past TSCA compliance concerns are all protected activity. A complaint or charge of employer retaliation because of safety and quality control activities is protected activity under the TSCA. *See McCuistion v. Tennessee Valley Auth.*, 89-ERA- 6 (Sec'y Nov. 13, 1991). For example, Complainants letter of July 10, 1995 in response to Skip Rung's letter is a protected activity. Likewise, Complainant's use of HP's "open door policy" to meet with Dana Seccombe, the general manager, is a protected activity. In addition, Complainant's October 27, 1995 letter to Mr. Seccombe is a protected activity.

Complainant's December 5, 1995, and December 19, 1995, threats to report HP to the authorities are both protected activities. The whistleblower provisions protect preliminary steps to commencing or participating in a proceeding when those steps "could result in exposure of employer wrongdoing." *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1 (Sec'y Apr. 27, 1987), slip op. at 6. An employee's threat to file a complaint with government authorities is protected activity. *See Couty v. Arkansas Power & Light Co.*, 87-ERA-10 (Sec'y June 20, 1988), *adopting*, (ALJ Nov. 16, 1987), *reversed on other grounds*, 886 F.2d 147 (8th Cir. 1989); *Cram v. Pullman- Higgins Co.*, 84-ERA-17 (Sec'y Jan. 14, 1985), slip op. at 1 (in both cases, threat to make report to government agency constituted protected activity).

Finally, Complainant's September 23, 1996, letter to the EPA alleging various TSCA violations is protected activity.

I must also determine whether Respondent had knowledge of Complainant's protected activities. It is undisputed that Respondent, via its managers, had knowledge of all of Complainant's protected activities with the exception of the September 23, 1996, letter to the EPA. Complainant never informed anyone at HP regarding his 1996 complaint to the EPA. Respondent did not have knowledge about this letter until after Complainant had been terminated.

Next, I must determine whether HP took any adverse action against Complainant in retaliation for his engaging in the various protected activities. In essence, Complainant alleges that there are six types of retaliation here: 1) Re-assignment from regulatory work to dye research; 2) performance ranking decreases; 3) denial of his request to transfer to San Diego; 4) denial of a promotion to level 62; 5) denial of a promotion to level 64; and 6) termination of his employment.

Respondent contends that Claimant can only seek relief for his termination because his complaint did not ask for relief for the other alleged retaliatory acts. RPB 23. I disagree. A whistleblower complaint need not meet the formal pleading requirements. *See, Sawyers v. Baldwin Union Free School District*, 88-TSC-1 (Sec'y Oct. 5, 1988). I also note that Respondent was not prejudiced by Complainant's failure to plead the non-termination retaliatory acts. Complainant has voiced these allegations on many occasions prior to the hearing.

Respondent argues that any claim for relief for acts prior to the termination is time barred. I agree. The employee protection provision of the TSCA explicitly provides that any complaint shall be filed within thirty days after the occurrence of the alleged violation. *See* 15 U.S.C. § 2622 (b). While the complaint was timely filed for the act of termination, Complainant failed to file a complaint within 30 days of the other potential violations.

However, Complainant argues that he is entitled to relief for the non-termination violations under a continuing violation theory. The timeliness of a claim may also be preserved under the continuing violation theory, where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days of the last discriminatory act. *See Egenrieder v. Metropolitan Edison Co.*, 85-ERA-23 (Sec'y Apr. 20, 1987). The court in *Berry v. Bd. of Supervisors of LSU*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986), identified three relevant factors: 1) the subject matter of the violations; 2) the frequency of the violations; and 3) the degree of permanence - whether the acts have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.

I find that the alleged non-termination violations do not constitute a continuing violation. The subject matters of the violations are distinct and not interrelated. For example, the denial of promotions are separate and distinct from Complainant's re-assignment to dye research. The

frequency of the violations are infrequent and succinct. For example, the performance rank decreases occurred sporadically from 1991 to 1996. Complainant's ranking actually increased in 1994. The veto of the request to transfer to San Diego was a one time occurrence. The alleged violations have such a degree of permanence that Complainant should have asserted his rights within thirty days after each occurrence. For example, the denial of the promotions have a high degree of permanence. The court in *Waltman v. Int'l Paper Co.*, 875 F.2d at 476 (5th Cir. 1989), determined that a denial of a promotion resulted in such a degree of permanence that it could not be considered a continuing violation.

Even though the Complainant is not entitled to relief for the non-termination violations, they are relevant evidence regarding Respondent's pattern of conduct dealing with Complainant.

Even assuming, *arguendo*, that the non-termination events are actionable, I find that the Complainant has failed to establish that they were in retaliation for Complainant's protected activities. Complainant failed to demonstrate that the declines in his performance rankings were in retaliation for his protected activities. Complainant's protected activity began in 1985; yet, the performance declines did not occur until July, 1992. CX 40. Mr. Coyier testified credibly that the drop in ranking in 1992 was due to Complainant's poor performance in achieving his objectives, primarily in the area of light fastness improvements. TR 698-699. CX 40. Likewise, Dr. Hindagolla testified credibly that the drop in ranking in July 1993 was also due to Complainant's poor performance relative to his peers. TR 759-760. Finally, both Dr. Shields and Mr. Loren Johnson testified credibly that the drops in rankings in November 1994 and May 1995 were also due to Complainant's poor performance relative to his peers. TR 1005-1006, 1337-1341.

Complainant contends that HP retaliated against him by reassigning him from regulatory duties to dye research in 1991 and by failing to promote him as promised to a level 62 position. Complainant further contends that Mr. Coyier agreed to hire a toxicologist to work under Complainant in the regulatory area. TR 203-205. Mr. Coyier testified that Complainant wanted to get out of regulatory work and get into mainstream dye and ink design. TR 674-675. Mr. Prevost also testified that Complainant wanted to get out of regulatory work. TR 897. In August 1989, Complainant stated in his performance plan that "eventually, we should reach a decision point, and I should focus my efforts on either toxicology or dyes." RX 76, p. 325. There is no evidence to support Complainants contentions. Mr. Coyier denied that he promised to promote Complainant. TR 680. Neither the employment requisition or advertisements for the position suggest that the toxicologist would be assisting Complainant. RX 88; RX 10. Complainant in his July 1989 performance evaluation stated: "I would be a mediocre manager and I choose NOT to seek a project manager position." RX 76, p. 325. In sum, I find that Respondent never promised to promote Complainant, and the reassignment was not retaliatory. Complainant requested to work in the field of dye research.

I also find that Complainant's application for a transfer to San Diego was not rejected in retaliation for his complaints. Complainant applied for a transfer to San Diego in March 1994. Complainant contends that the retaliation occurred when his former manager, Dr. Hindagolla, told the San Diego hiring manager inaccuracies about his performance. TR 783-784. Dr. Hindagolla testified credibly that he supported the transfer and gave an honest evaluation of Complainant's performance. TR 784-786. The hiring manager told David Bruce that he rejected the transfer because Complainant was still focused on his problems with Dr. Holcomb. RX 175. P. 832.

Complainant contends that HP retaliated against him by denying him a promotion to a level 64 position that he applied for in 1996. TR 285-287. Mr. Prevost testified to the qualifications required for the position. He credibly testified that Complainant was not qualified because he had not demonstrated an ability to lead technical teams and because of his communication difficulties. TR 913-918. Complainant's other section manager, Mr. Fischer, testified that Complainant lacked the necessary abilities to handle a level 62 or 64 position because of deficiencies in his leadership, teamwork, and communication skills. TR 969-970. Complainant failed to demonstrate how he is qualified for the position. The level 64 position requires 3 years of experience in a level 62 position. CX 73. Complainant lacks experience as a level 62. While the record shows that Complainant is intellectually strong in organic chemistry, intelligence is not a substitute for specific skills, especially a management position that is focused on getting results. I find that Respondent did not retaliate against Complainant by denying the request for a promotion. Complainant was not qualified for the position.

The heart of this case is whether Complainant was terminated in retaliation for his protected activities. Complainant's employment at HP is colored by a long history of internal regulatory complaints. While Complainant's prior complaints primarily took on the form of his complaining to his immediate managers or to Mr. Bruce, the complaints began to escalate in 1995. Complainant hired an attorney. He progressively brought his complaints higher up the chain of command at HP. His complaints were lengthy and were highly critical of several HP managers. Not only did Complainant contact the general manager, Mr. Seccombe, via the open door policy, but he contacted HP's general counsel Jack Brigham as well as the founders of the company, Bill Hewlett and Dave Packard. In December 1995, Complainant threatened to contact federal authorities. RX 181, p. 870. In July 1996, Mr. Seccombe first decided to terminate Complainant's employment. The temporal proximity of the termination to Complainant's escalation of his complaints supports the inference that the termination was retaliatory.

Respondent argues that it terminated Complainant's employment for legitimate business reasons — Complainant was fired for wilfully submitting false documents to the EPA in violation of company policy. As previously discussed, I find this reason to be invalid. Complainant's conduct was so entangled with HP's conduct that Complainant should not have been held solely responsible for filing the false documents.

An employer's discharge decision is not unlawful even if it was based on a mistaken conclusion about the facts, but a decision violates the Act only if it was motivated by retaliation. *See Morgan v. Massachusetts General Hospital*, 901 F.2d 186, 191 (1st Cir. 1990); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989); *Jeffries v. Harris County Community Action Assoc.*, 615 F.2d 1025, 1036 (5th Cir. 1980). *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991). In *Seraiva v. Bechtel Power Corp.*, 84-ERA-24 (ALJ July 5, 1984), *adopted* (Sec'y Nov. 5, 1985), the complainant was discharged for failing to verify that safety tags had been put where they should have been. The ALJ found that the complainant's supervisors believed that it was complainant's responsibility to verify the placement of the tags, and although the complainant disputed whether it was really his responsibility to make that verification, the ALJ found that it did not matter whether the discharge was warranted under the circumstances but only whether the discharge was in retaliation for protected activity. The ALJ quoted *Turner v. Texas Instruments*, 555 F.2d 1251, 1257 (5th Cir. 1977): "Title VII and section 1981 [Equal Rights Under the Law, including freedom from employer retaliation] do not protect against unfair business decisions — only against decisions motivated by unlawful animus." Therefore, I must still determine whether the termination was pretextual.

Respondent cannot rely in good faith on the Landfair report. The investigation itself was not entirely fair. Mr. Landfair was a partner at McKenna & Cuneo, a law firm whose clients include HP and who represents Respondent in this case. Such an arrangement gives, at the least, an impression of a conflict of interest. Mr. Landfair was hired to investigate all of Complainant's complaints. Complainant had previously complained that HP had retaliated against him on several occasions. Mr. Landfair testimony suggests that he investigated these charges only to the extent that they were raised in the letter to Mr. Brigham, but his report is silent regarding the retaliation charges. TR 1179-1180. Mr. Landfair's associate, Mr. Curiale testified that they did not focus on the retaliation allegations because HP had already concluded that no retaliation occurred. Curiale Depo, p. 32. This explanation is suspect. The entire purpose of the Landfair investigation was to have an independent party investigate Complainant's concerns because Complainant was not satisfied with HP's internal investigations.

Mr. Landfair focused on Complainant's involvement in filing the PMN and NOC notices for the Think-Jet inks. While he personally interviewed Complainant four times, he only interviewed Mr. Gardner once over the telephone after his initial meeting with Complainant. TR 1145. RX 200. Mr. Gardner's statement was critical since Complainant contended that he filed the notices in response to Mr. Gardner's instructions. Mr. Landfair was not as diligent in interviewing Gardner. He did not take any notes. TR 1181. Mr. Landfair's report indicates that Mr. Gardner never instructed Complainant to violate the law, but the report fails to mention that Mr. Gardner told Complainant that there was no need to stop manufacturing and that there was no need to notify the EPA about the violations. RX 200. The report appears to place all of the blame on Complainant without delving into the possibility that Mr. Gardner's instructions contributed to the problem. Since Mr. Landfair was acting as Respondent's agent, Respondent cannot disavow any mistakes or deficiencies in Mr. Landfair's investigation.

HP's reliance on the Landfair report suggests that the falsifying documents charges were pretextual. Mr. Bruce testified that in determining the appropriate level of discipline company managers consider the following factors: 1) whether the employee understood the rule in question; 2) whether the employee was trained properly concerning the rule; 3) whether the offense was repeated; 4) whether the offense was stale; and 5) whether management did anything to contribute to the error. There was no testimony that these factors were considered by HP's managers and legal personnel who attended the July 1996 meeting concerning the decision to terminate Complainant. The evidence supports that there were several mitigating factors here. The alleged misconduct occurred over 11 years prior to his termination. Complainant had only been with the company for several months and had not received any formal training regarding filing PMN and NOC notices. Mr. Gardner's imprecise advice contributed to Complainant filing the notices with false information. The managers did not inquire into Mr. Gardner's role in the matter. They did not ask to see any of Landfair's notes. Complainant was never asked by Respondent to respond to the Landfair report.

I find that Respondent's reason for terminating Complainant is pretextual, and the termination was motivated by Complainant's long history of protected activities. At worst, Respondent's managers decided that they could not put up with any more complaints by Complainant and decided to seize upon the Landfair report to rid themselves of the problem. At best, Respondent was tired of dealing with Complainant's numerous complaints and jumped at the opportunity to dispose of the Complainant as a retaliatory act. Respondent's willful blindness and acquiescence to the Landfair report is not a defense.

In sum, after carefully reviewing all of the evidence I find that Complainant has established by a preponderance of the evidence that he was terminated in retaliation for his long history of protected activity. Respondent's attempt to fire Complainant for conduct that occurred 11 years in the past was pretextual.

DAMAGES

Since I find that Respondent retaliated against Complainant by terminating his employment, Complainant is entitled to appropriate damages. Complainant is entitled to reinstatement and back pay from the date his termination became effective. He is not entitled to a promotion.

Complainant also claims compensatory damages as a result of his termination. Complainant testified that the termination negatively affected his social life and professional contacts, and he became depressed and embarrassed. TR 287-289. Where a violation is found, the TSCA permits the award of compensatory damages in addition to back pay. *See* 15 U.S.C. § 2622(b)(2)(B)(iii). Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. The testimony of medical or

psychiatric experts is not necessary, but it can strengthen a Complainant's case for entitlement to compensatory damages. *See Thomas v. Arizona Public Service Co.*, 89- ERA-19 (Sec'y Sept. 17, 1993). Here, Complainant did not produce any evidence documenting these damages. The only evidence is Complainant's very generalized descriptions. While getting fired is frequently a traumatic and difficult event in life, it does not automatically afford one compensatory damages. I find that compensatory damages are not appropriate here because they are speculative at best.

The Toxic Substances Control Act, explicitly permits "where appropriate, exemplary damages." 15 U.S.C. § 2622 (b) (2) (B). This is not such a case. While I believe that Respondent ultimately terminated Complainant in retaliation for his long history of internal complaints, there are several mitigating factors present. Respondent was in a difficult situation in handling Complainant's laundry list of complaints over many years. Respondent took many steps including hiring outside consultants, initiating internal investigations, and hiring an outside investigator. Complainant also appeared to exhibit a great deal of animosity towards Dr. Holcomb. I do not believe that there was any grand conspiracy to "get" Complainant. Instead, Respondent appeared overly eager to take advantage of the Landfair report and terminate Complainant. While Respondent should not have blindly accepted the Landfair report's conclusions, its conduct was not so egregious to warrant exemplary damages.

RECOMMENDED ORDER

It is ORDERED That:

1. Respondent reinstate the Complainant to the Complainant's former position.

2. Respondent pay Complainant back pay from the date termination became effective until Complainant resumes employment.

3. Respondent provide Complainant with all the terms, conditions and privileges of employment including, but not limited to, seniority, pension benefits, health insurance benefits, and pay increases to make Complainant whole.

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California